No. 04-502

IN THE

Supreme Court of the United States

MICHAEL J. VALLONE, JOYCE E. HEIDEMANN, AND JAMES J. O'KEEFE,

Petitioners,

v.

CNA FINANCIAL CORP., A/K/A CNA CASUALTY OF ILLINOIS, AND THE CONTINENTAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that there was no breach of fiduciary duty under Section 404 of ERISA, 29 U.S.C. § 1104, in this case where the Plan's language clearly reserved respondents' right to terminate petitioners' health benefit and there was no evidence either of an intent to mislead or even of any actual misunderstanding by the petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Continental Insurance Company is a wholly owned, second-tier subsidiary of CNA Financial Corporation. No publicly held company owns 10% or more of CNA Financial Corporation.

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Respondents CNA Financial Corporation and Continental Insurance Company hereby oppose the petition for a writ of certiorari filed by Michael J. Vallone, et al., seeking review of the judgment and opinion of the court of appeals in this case.

STATEMENT

Petitioners are three individuals who are former employees of respondent Continental Insurance Company. They seek review of the decision of the court of appeals that respondents Continental and its current parent, CNA, did not violate Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), when the latter exercised an express contractual reservation of the companies' right to terminate a discretionary health care benefit provided to Continental retirees, such as petitioners.

The petition makes only the most cursory effort to justify this Court's review and in the process identifies as its question presented an issue that is not posed by the holding below and relies upon an asserted conflict among the circuits without making any effort to show that this case is an appropriate vehicle for resolving any such conflict. In fact, there is no conflict over what "standard of proof" applies to breach of fiduciary duty claims under ERISA and this case is a wholly inapt vehicle for deciding any legal issue with regard to the proper interpretation of Section 404(a). Accordingly, the petition should be denied.

Continental is an insurance company that operates throughout the United States. It is a second-tier subsidiary of CNA, which acquired Continental in 1995. Pet. App. 3a. The three petitioners were employees of Continental and each of them accepted early retirement from Continental in 1992, pursuant to a Voluntary Special Retirement Program ("VSRP"). *Id.* Their retirement package included a Health Care Allowance ("HCA") that was described as providing a "'lifetime' benefit." They also were orally told that the HCA was a "'lifetime' benefit." *Id.* at 6a & n.2.

The HCA was not, however, offered to petitioners in a vacuum. During their employment, petitioners received health insurance benefits under a comprehensive plan that was adopted in 1990. Under the 1990 plan, Continental expressly reserved the company's right to amend or terminate all benefits. The Plan provided as follows: "The Plan may be amended or terminated at any time or from time to time by the Board of Directors of The Continental Corporation or the Compensation Committee of said Board." R. 109: Exh. 1, § 8.1.

Continental also provided petitioners with a Summary Plan Description in 1991 before they elected to take voluntary retirement. In that document Continental described the HCA as "individually determined, monthly dollar amounts [which are] based on length of service and age at retirement . . . [and

may be used] to reduce your contributions for [health insurance] coverage during retirement [or] to pay for qualified medical expenses . . . for you and your eligible dependents." R. 109: Exh. 4, pp. 2-19, 2-46; R. 108, ¶ 25. This summary plan description contained multiple reservation of rights clauses that clearly authorized Continental to amend or terminate health care benefits. Thus, in the section where the HCA is described, the Plan specifically states that "[t]he Company reserves the right to amend, revoke or suspend Medical Care coverage at any time." R. 109: Exh. 4, p. 2-26; R. 108, ¶ 28.

It was against this background that petitioners elected to retire early in 1992. In 1998, three years after CNA acquired Continental, respondents notified all Continental retirees, including those that retired pursuant to the VSRP, that the companies were exercising their right to terminate the HCA benefit effective January 1, 1999, and this litigation ensued thereafter.

2. Petitioners filed a putative class action in the United States District Court for the Northern District of Illinois on behalf of all early retirees under the VSRP. The complaint sought relief on four grounds: failing to pay benefits in violation of Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B); breach of fiduciary duty in violation of Section 404 of ERISA, 29 U.S.C. § 1104; breach of ERISA and common law bilateral contracts and promissory estoppel under state law. The class, however, was never certified and the claims of the three individual plaintiffs were dismissed by the district court on summary judgment. Pet. App. 40a-47a.

The court of appeals unanimously affirmed. Pet. App. 1a-39a. The court dealt with each claim for relief in turn. With regard to the assertion that respondents violated ERISA by failing to pay benefits, the court held that ordinarily employers are free to amend or terminate welfare benefits, unless there is clear evidence in the written plan documents that there is a vested right to a particular benefit. The court

held that the clear reservation of rights clause that accompanied the reference in the Plan to a "'lifetime'" benefit required the conclusion that the benefit had not vested at the time of petitioners' retirement. *Id.* at 16a. The court concluded that the relevant documents explain plainly that "the plan in its current iteration entitles retirees to health coverage for the duration of their lives and the lives of their eligible surviving spouses," but that these benefits "are subject to change at the will of [respondents]." *Id.* at 17a (quoting *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 704 (7th Cir. 2003)).

Next, the court of appeals rejected in short order petitioners' breach of ERISA and common law contract claims and an estoppel claim under ERISA. Finding the contract claims to be essentially a restatement of the wrongful denial of ERISA benefits claim, the court dismissed them as a matter of federal law for the same reason that the court rejected the wrongful denial count – there is no vested right to any benefit. Pet. App. 25a. To the extent that petitioners were seeking recovery independently under state law, the court concluded that such a claim is clearly preempted by ERISA under this Court's decision in *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004). Pet. App. 25a-26a. With regard to estoppel, the court held that "plaintiffs have not shown a knowing misrepresentation of fact" and that "the early retirees were not told explicitly that the 'lifetime' benefits were irrevocable," which the court found fatal to petitioners' claim. *Id.* at 28a.

Finally, the court rejected petitioners' claim that respondents had breached their fiduciary duties under Section 404 of ERISA. The court described the Seventh Circuit's rule as follows: "a breach of fiduciary duty exists if fiduciaries 'mislead plan participants or misrepresent the terms of administration of a plan.'" Pet. App. 30a (quoting *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993)). Further, the court recognized that "'fiduciaries must

communicate material facts affecting the interests of plan participants or beneficiaries'" and this duty exists whether the fiduciary is asked for the information or not. *Id.* (quoting *Bowerman v. Wal-Mart Stores*, 226 F.3d 574, 590 (7th Cir. 2000)).

The panel held that respondents fulfilled these duties. First, the court found that "there is simply no evidence that Continental set out to deceive its employees by its actions." Pet. App. 33a. The court then observed that "it is not even clear that the information provided was inaccurate." *Id.* Here again, the court of appeals turned to the record and found: "no evidence that any employee ever specifically asked about the irrevocability of the HCA benefit, that [respondents] falsely indicated to any employee that the HCA benefit was irrevocable or that [respondents were] aware that the early retirees were coming to the mistaken conclusion that 'lifetime' equated to 'vested.'" *Id.* And finally, the court observed that only "accurate written information" was provided to petitioners, which doomed petitioners' fiduciary duty claim. *Id.*

ARGUMENT

The holding of the court of appeals in this case does not conflict with the holding of any other court of appeals and is fully consistent with this Court's decisions interpreting Section 404 of ERISA. The decision below turns on a narrow set of facts – respondents' reserved their rights in the same plan document that created the HCA benefit that was terminated and respondents neither misrepresented the nature of the benefit nor were even "aware" that petitioners may have labored under any "mistaken conclusion" about the nature of the HCA benefit at issue. This inherently fact-intensive ruling poses no issue that warrants this Court's review. Accordingly, the petition should be denied.

1. Petitioners do not challenge the holding of the court of appeals that the Plan unambiguously reserved respondents' right to terminate the HCA benefit. Thus, the only issue is whether the court of appeals properly applied Section 404 of ERISA to the undisputed facts of this case as described by the court of appeals.

Petitioners make little effort (Pet. 5-8) to show any actual conflict in decisions among the Circuits that would be relevant to the proper resolution of this case. To be sure, the panel acknowledged that its prior opinion in *Frahm v. Equitable Life Assurance Society of the United States*, 137 F.3d 955 (7th Cir. 1998), announced a rule that was less favorable to plan beneficiaries who are offered "lifetime" benefits than the approach followed in other Circuits. Pet. App. 15a. But this is not the *Frahm* case. This case follows, a fortiori, from *Frahm* and there is no basis for believing that any other Circuit would have decided this case differently.

For instance, the Second Circuit in *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 102-03 (2d Cir. 2001), *cert. denied*, 537 U.S. 1170 (2003), merely remanded for further proceedings in light of the plaintiffs' claims that the defendants had "repeatedly provid[ed] misleading information about 'lifetime' life insurance benefits." In so holding the court followed the Third Circuit's approach in *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255, 1264 (3d Cir. 1995), also relied upon by petitioners (Pet. 7), that a breach of fiduciary duty under ERISA exists "when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm." 274 F.3d at 103 (internal quotation marks omitted) (quoting *Kunkel v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001) (quoting *Unisys*, 57 F.3d at 1264)). By contrast here, the court of appeals specifically found no evidence that respondents had made any false statements about the nature of the benefit or were even

aware that there was any misunderstanding by petitioners. Pet. App. 33a. Thus, the kind of conduct that the Second and Third Circuits suggested might trigger liability in *Unisys* and *Abbruscato* simply is not involved in this case.

Petitioners' reliance (Pet. 7) on the Sixth Circuit's decision in *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 453-56 (6th Cir. 2002), *cert. denied*, 538 U.S. 1033 (2003), is even more misplaced. The court below properly recognized that the fiduciary in *Pirelli* "misrepresented to employees that a reservation of rights clause in the plan did not allow retirement benefits to be changed when the legal effect of the clause would be precisely the opposite." Pet. App. 29a-30a (citing *Pirelli*, 305 F.3d at 455-56). Here, there were no misrepresentations; indeed, the reservation of rights clause was included with the description of the HCA, which made clear that petitioners' had no vested rights to the HCA benefits, a point petitioners do not now contest.

In sum, there simply is no reason to believe that any other Circuit would have decided this case any differently than the way the Seventh Circuit did. Where, as here, the plan was unambiguous in reserving respondents' right to terminate the HCA and no misrepresentation was made by respondents, there is no basis for liability under Section 404 of ERISA. The most that can be said is that the case was easier to decide in respondents' favor in the Seventh Circuit, but the fact remains it would have been decided the same way in the other Circuits as well. In all events, the holding of the court of appeals in this case does not warrant further review by this Court.

2. Almost as an afterthought, petitioners suggest that the court of appeals somehow misinterpreted this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996). Specifically, they argue that the court of appeals has limited *Varity* to "situations where there are outright lies to employees." Pet. 10. But this is a plain misreading of the opinion below. As the court explained (Pet. App. 30a),

fiduciaries have an affirmative duty to "communicate material facts affecting the interests of plan participants" and this duty exists whether anyone asks for information or not. Thus, the court of appeals clearly does not read the fiduciary's duties under ERISA as interpreted in *Varity* narrowly.

Moreover, this Court in *Varity* ruled narrowly that "'[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.'" 516 U.S. at 506 (alteration in original) (quoting *Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)). Thus, even if the court of appeals had limited liability under Section 404 to deliberate misrepresentations, that would have done no violence to this Court's previous holding.

Petitioners attempt to read *Varity* more broadly by suggesting that it incorporates common law trust principles into ERISA. But this Court expressly declined to decide to what extent, if any, trust principles do more than inform the proper interpretation of ERISA responsibilities. *Id.* The Court recognized that the common law provides a starting point, but refused to decide whether ERISA necessarily is co-extensive with the common law. *Id.* ("[W]e need not reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries."). Of course, the Seventh Circuit explicitly has decided the issue left open in *Varity* and held that fiduciaries do have an affirmative duty to disclose material information truthfully whether in response to an inquiry or not. Certainly, petitioners are not challenging that rule.

* * * *

It may well be that this Court sometime in the future will have to decide when liability arises under Section 404 of ERISA in the context of a "lifetime" welfare benefit that has not been properly explained to plan beneficiaries and participants. But this is not the time and this is clearly not the

case. Here, it is plain that petitioners' HCA benefits as part of the VSRP were clearly described to them as subject to modification or termination and nothing was said either in writing or orally by respondents to the contrary. No court has found liability on these facts and therefore this case does not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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